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CHARLES ELMORE CROPLE
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 565

SHELL OIL COMPANY, INCORPORATED,
Appellant,

vs.

BOARD OF COUNTY COMMISSIONERS OF GRANT COUNTY, KANSAS, C. L. DEW, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

STATEMENT AS TO JURISDICTION

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IN THE SUPREME COURT OF THE
STATE OF KANSAS

No. 38249

SHELL OIL COMPANY, INCORPORATED,
Appellee,

vs.

BOARD OF COUNTY COMMISSIONERS OF GRANT COUNTY, KANSAS, C. L. DEW, ET AL.
Appellants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, Shell Oil Company, Incorporated, appellants in the Supreme Court of the United States, submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the Supreme Court of the State of Kansas entered in this cause.

Opinions Below

The original opinion of the Supreme Court of the State of Kansas is reported in 171 Kan. 159, 231 P. (2d) 220 (attached as Appendix A). The opinion of the Supreme Court of the State of Kansas on rehearing is reported in 171 Kan. 595, 237 P. (2d) 257 (attached as Appendix B). An opinion of the Supreme Court of the State of Kansas on an earlier

appeal of the same case is reported in 165 Kan. 642, 197 P. (2d) 925 (attached as Appendix C).

Statement of Facts

On March 19, 1942, the Board of Commissioners of Grant County, Kansas instituted an action in the District Court of said county to foreclose tax liens on various tracts of land, including an undivided one-half (½) interest in the minerals in and under and that might be produced from the Northeast Quarter (NE¼) of Section Five (5), in Township Twenty-Seven (27) South, Range Thirty-Five (35) West of the Sixth Principal Meridian, in Grant County, Kansas, alleged to have been owned by Shell Petroleum Corporation. Service by publication only was had on Shell Petroleum Corporation though it could have been served through the Secretary of State of the State of Kansas. Foreclosure judgment was rendered by default on June 9, 1942. Thereafter, the Sheriff of Grant County, under an order of sale issued out of said Court, purported to sell said mineral interest. *Said mineral interest was bid in for $10.00 at the Sheriff's sale by C. L. Dew, appellee, who was at that time a member of the Board of County Commissioners of Grant County.* The sale was confirmed by the Court on August 5, 1942 and Sheriff's deed, dated August 6, 1942, was issued to said C. L. Dew. Shell Oil Company, Incorporated is the successor in interest to Shell Petroleum Corporation.

On January 2, 1946 Shell Oil Company, Incorporated, instituted this action in the District Court of Grant County, Kansas and alleged that C. L. Dew, as the County Commissioner, was disqualified to acquire title by a tax deed and prayed, *inter alia*, that the tax deed to C. L. Dew "be declared null and void and of no force and effect as against this petitioner."

Statute Involved

The statute which is drawn in question in this case is a statute of the State of Kansas, Section 22 of Chapter 375 of the Session Laws of the State of Kansas for the year 1941, Section 2804(b) of Chapter 79 of the 1941 Supplement to the General Statutes of Kansas of 1935. Said statute provides:

> "Legal or equitable actions or proceedings may be brought to open, vacate, modify or set aside any judgment rendered for taxes, interest and costs or any order of sale made under the provisions of section 19 hereof, or any sale made under the provisions of section 20 hereof, but every such action or proceeding, *including those brought on the grounds and in the manner prescribed by the code of civil procedure*, must be commenced within six months after the date of the sale of the real estate, which was affected by such judgment, order of sale or sale, was confirmed by the court. The provisions of this section shall apply to all judgments, orders of sale, and sales whether the purchaser at the foreclosure sale be a county or an individual."

Jurisdiction

The original judgment of the Supreme Court of the State of Kansas was entered on May 12, 1951. A rehearing was granted on July 24, 1951 and on November 10, 1951 the said Court rendered an opinion in which it adhered to its original opinion and final judgment was then entered against appellant in said Court, which Court is the highest Court of said State. A petition for appeal is presented to the Chief Justice of the Supreme Court of the State of Kansas herewith, to-wit, on December 31, 1951.

The jurisdiction of the Supreme Court to review this

judgment by appeal is conferred by Title 28, United States Code, Section 1257, which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

This is an action by appellant to have a tax deed to the appellee, C. L. Dew, "declared null and void" for the reason that C. L. Dew was a disqualified purchaser at the tax sale. The District Court of Grant County, Kansas, where the action was brought, concluded that:

> "C. L. Dew, by reason of being a member of the Board of County Commissioners of Grant County, Kansas, during the pendency of Case No. 1655, and at the time of the sheriff's sale therein, was not an eligible purchaser, and the sale to him was void."

The District Court accordingly rendered judgment for the appellant "that the title of plaintiff to said real property be, and is hereby quieted and confirmed * * *" and "that the defendants be, and they are hereby barred, foreclosed and excluded from any right, title or interest in or lien upon said real property."

Said judgment was appealed and in its original opinion the Supreme Court of the State of Kansas stated that "We are convinced that the conclusion of the lower court that the defendant was not an eligible purchaser was eminently correct, if for no other reason than upon grounds of sound public policy."

However, the Supreme Court of the State of Kansas reversed the judgment of the lower court for the reason that the action was brought too late and was barred by the statute of the State of Kansas above quoted. The Court stated in its opinion that:

> "Despite our holding that defendant was not an eligible purchaser at the sheriff's sale, and irrespective of whether the sale, confirmation thereof and the deed be considered void or merely voidable—we are of the opinion plaintiff's action was brought too late."

While the question as to the constitutionality of said statute as applied to the facts of this case had been duly presented and argued in the briefs before the Supreme Court, the opinion failed to discuss that question. Therefore, after the Supreme Court rendered its decision, appellant promptly filed a motion with said Court moving said Court to either "certify for the record that this movant duly raised, presented and urged that Article 79-2804(b), General Statutes, Kansas 1941, was unconstitutional as applied to the facts of this case and that application thereof constituted a taking of its property without due process of law in violation of the 14th Amendment to the Constitution of the United States of America and that said constitutionality was passed upon by this Honorable Court and overruled and the constitutionality of such statute thereby upheld," or grant a rehearing. The Court adopted the latter course and granted a rehearing on July 24, 1951.

The Supreme Court of the State of Kansas on the rehearing adhered to the original opinion of the Court, but in its opinion on rehearing the Court passed squarely upon the constitutional issue involved. Said the Court in its opinion:

> "* * * A rehearing was granted to appellee, and it is argued that the application of G. S. 1941 Supp.

79-2804b to prevent the recovery of title to land as against one claiming under a void deed constitutes a taking of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, and that the legislature cannot change ownership into a mere right of action and then declare a forfeiture of the title if the owner fails to bring an action within the six months' period provided for in the statute.

"We have examined these arguments and the authorities cited in support thereof, but in our opinion they are either inapplicable to the question before us or without substantial merit.

"Further consideration of this question convinces us of the soundness of the rule laid down in our original opinion, namely, that in proceedings governed by the Tax foreclosure act, G.S. 1941 Supp. 79-2801 to 2809, every action, either legal or equitable, to open, vacate, modify or set aside any judgment rendered for taxes, or any order of sale or sale made thereunder, *including those actions brought on the grounds and in the manner prescribed by the code of civil procedure, must be commenced within six months after the date of confirmation of sale*, G. S. 1941 Supp. 79-2804b. *We think it was within the power of the legislature to enact such a statute fixing a definite time within which such an action may be brought.* * * *" (p. 258)

Thus the above quoted statute of the State of Kansas was expressly drawn in question before the highest court of that state on the ground of its being repugnant to the Constitution of the United States and the decision of the Court was in favor of the statute's validity. The following cases sustain the jurisdiction of the Supreme Court to review on appeal the judgment in this case. *Cumberland Coal Co.* v. *Board of Revision*, 284 U. S. 23, 52 S. Ct. 48, 76 L. Ed. 146; *Atchison, Topeka & Santa Fe Railway Co.* v. *Harold*, 241 U. S. 371, 36 S. Ct. 655, 60 L. Ed. 1050; *Illinois Central R.*

Co. v. *Kentucky*, 218 U. S. 551, 31 S. Ct. 95, 54 L. Ed. 1147; *Grannis* v. *Ordean*, 234 U. S. 385, 34 S. Ct. 779, 58 L. Ed. 1363.

Question Presented

Is the above quoted statute of the State of Kansas, when construed by the Supreme Court of the State of Kansas to be a bar to this action to declare null and void a void tax deed, repugnant to the Fourteenth Amendment to the Constitution of the United States in that it deprives appellant of its property without due process of law?

The Question Is Substantial

Concisely stated, the fundamental issue raised by this appeal is whether a state legislature has the power to enact a statute which transfers title to real property from its true owner to another merely because six months have elapsed since the latter became grantee of a void tax deed. If the legislature has this power, the guaranty of the Fourteenth Amendment that no person shall be deprived of his property without due process of law has been rendered nugatory.

The facts here are as follows:

This appellant, owner of an undivided one-half (½) interest in the minerals in and under the land here involved, was named a party defendant in a tax foreclosure proceeding in 1942. It was served by publication only. Default judgment was rendered on June 9, 1942. Appellant's land was sold to C. L. Dew, then a member of the Board of County Commissioners. The sale was confirmed on August 5, 1942 and the deed issued on August 6, 1942. On January 2, 1946 the appellant instituted this action in the District Court of Grant County, Kansas and prayed that the tax deed to C. L. Dew "be declared null and void and of no force and effect as against this petitioner."

The District Court held the appellee C. L. Dew was a

disqualified purchaser and grantee and that the sale and deed to said appellee was void and title was quieted in this appellant. On appeal the Supreme Court of Kansas in its original opinion stated that "we are convinced that the conclusion of the lower court that the defendant was not an eligible purchaser was eminently correct, if for no other reason than upon grounds of sound public policy." It held, however, that the action was barred by that part of the Kansas statute previously set out at length which provides in part as follows: "* * * but every such action or proceeding, including those brought on the grounds and in the manner prescribed by the code of civil procedure, must be commenced within six months after the date of the sale of the real estate, which was affected by such judgment, order of sale, or sale, was confirmed by the court."

The Kansas Supreme Court held this statute to be a bar to appellant's action notwithstanding the fact that there was no showing of possession by C. L. Dew during the six-month period or thereafter. On rehearing the Kansas Supreme Court upheld the constitutionality of this statute as applied to the facts so stated. In so holding we submit the court seriously erred.

The tax deed was contrary to public policy and void. The title and constructive possession remained in this appellant. To hold that such a statute is a bar to appellant's action is to transfer title by legislative fiat, in contravention of the Fourteenth Amendment to the Constitution of the United States. It has been so held by numerous authorities.

The Supreme Court of Mississippi had before it for consideration a short tax "limitation" statute in the case of *Learenworth* v. *Claughton*, 197 Miss. 606, 19 So. (2d) 815 (1944). In that case the purchaser at the tax sale brought an action to determine title to the land against the fee owner who in turn cross filed. The tax sale was held to be void but it was urged by the purchaser at the tax sale that

the fee owner was barred by a two-year statute of limitation, which provides in part as follows:

> "* * * that the owner, mortgagee or other person interested in any land which had been heretofore or may be hereafter sold or forfeited to the state for delinquent taxes may bring a suit or action to cancel the title of the state, or its patentees, or to recover said land from the state, or its patentees, on account of any defect, irregularity or illegality in the assessment, levy or sale of such land for delinquent taxes, within two years after the date this act becomes effective as to lands heretofore sold or forfeited to the state for delinquent taxes, and within two years after the period of redemption shall have expired, as to lands hereafter sold or forfeited to the state for delinquent taxes, and not thereafter. * * *" (Section One of Chapter 196, Laws of Mississippi for the year 1934)

In discussing the applicability of this statute the court stated:

> "* * * But whatever else may have happened, the principle announced in Dingey v. Paxton, 60 Miss. 1038, has withstood the challenges of the years, and still fully stands, *that it is not within legislative power to divest an owner of his land, when he holds by a fee simple title with nobody else in possession, and transfer it to another:* and as this may not be done directly, it may not be done indirectly by an enactment the effect of which is to cut down the ownership to a mere right of action, and that even that shall be lost unless asserted within the grace of a prescribed period. If, then, we had been obliged to look upon the statute according to its letter and asserted intention, *we would have had to declare it unconstitutional.*" (p. 816)

So in the case at bar it is not within the power of the legislature of the State of Kansas to divest this appellant of its land with nobody else in possession and to thereby transfer

title to C. L. Dew. To hold otherwise would be nothing short of confiscation.

In the early and leading case of *Groesbeck* v. *Seeley*, 13 Mich. 329 (1865), the Supreme Court of Michigan had occasion to pass on a short tax "limitation" statute having the same effect as the Kansas statute as construed by the Kansas Court. The court there discussed at length the effect of limitation statutes saying, in part:

> "* * * Such laws can only operate on those who are not already in the enjoyment and dominion of their rights. A person who has a lawful right, and is actually or *constructively* in possession, can never be required to take active steps against opposing claims. The law does not compel any man who is unassailed to pay any attention to unlawful pretenses which are not asserted by possession or suit. When such a title is set up, he has a right to defend himself, by jury, if the claim is one of common law cognizance, or otherwise, if of a different nature. But to hold that, under any circumstances, a man can be deprived of a legal title without a hearing, is impossible, without destroying the entire foundations of constitutional protection to property. *No one can be cut off by limitation until he has failed to prosecute the remedy limited; and no one can be compelled to prosecute, when he is already in possession of all that he demands.*" (p. 343)

* * * * * * *

> "* * * If this tax title can be thus made indefeasible against a title in possession, by mere lapse of time, it might as well have been declared so originally. *It would in either case be nothing more nor less than depriving one of his property without any legal process, and is simply confiscation by ministerial and not judicial action.*" (p. 344)

Likewise, we submit that the Kansas statute as construed by the Kansas Supreme Court in the case at bar is

nothing more nor less than deprivation of this appellant's property without any legal process.

In *Lind* v. *Stubblefield*, 138 Okla. 280, 282 Pac. 365 (1929), the Supreme Court of Oklahoma has categorically stated its views on short tax "limitation" statutes of the type with which we are here concerned when it said:

> "In other words, to give the statute the construction contended for by defendant would be depriving plaintiff of his property without due process of law. * * *
> " '*When the tax proceeding is void and the tax sales purchaser is not in possession, it is beyond the power of the legislature to transfer to the purchaser the title of the owner by lapse of time alone.*' " (p. 368)

It is the position of this appellant that the Supreme Court of Kansas in construing the tax "limitation" statute in question did not heed the admonition quoted above. On the contrary, we respectfully submit that the Supreme Court of Kansas has construed the statute in question so that it unquestionably deprives this appellant of its property without due process of law.

The Supreme Court of Arkansas has also considered the effect of its tax "limitation" statute, in the case of *Plant* v. *Johnson*, 208 Ark. 217, 185 S. W. (2d) 711 (1945). In that recent and well considered case the court concluded that such a tax "limitation" statute cannot be considered as passing title to the purchaser at the tax sale without violating the due process clause of the Constitution. In commenting on the annotation in 46 L.R.A., N.S., 1065, the court states:

> "* * * from that annotation it is apparent that the great weight of authority supports the statement that: a statute seeking to take away from the owner, in actual possession of his property, the right to set up as a defense the illegality of the tax (i.e., a void sale) *is an unconstitutional statute*, in that it deprives the owner

> of his property without due process of law. * * *" (p. 715)

The Supreme Court of Kansas itself has but recently held unconstitutional a statute which purports to pass title from one person to another without regard to possession. We refer to the recent case of *Murrison* v. *Fenstermacher*, 166 Kan. 568, 203 P. (2d) 160 (1949). The statute held to be unconstitutional in that case provided as follows:

> "In all cases where a plat of any original town or addition thereto has been of record more than twenty-five years and deeds executed by the person or corporation platting the same and conveying lots or blocks in said original town or addition have been of record more than twenty-five years prior to the taking effect of this act, such deeds shall be conclusively presumed to have conveyed perfect title notwithstanding any defect in the title of the grantor therein or the failure of the grantor's spouse to join therein: Provided always, such presumption shall not be applied in any action brought within one year from the date this act takes effect."

In holding this statute unconstitutional the court stated:

> "* * * *Therefore, since the involved statute has the effect of divesting the holder of a record fee simple title to land of his title and transferring it to another without regard to the possession and occupancy* of the owner whose title has never been alienated, unless his title and ownership is asserted in an action brought within one year from the date such statute took effect, *we are constrained to hold it violates the due process clause of the constitution and is invalid.*" (p. 165)

So in the case at bar it is obvious that the Supreme Court of Kansas in holding that this appellant is barred from

bringing an action against C. L. Dew has thereby construed the statute so as to transfer title out of this appellant to C. L. Dew without regard to the occupancy during this six-month period of time. We earnestly urge that the unwarranted construction of the Kansas Supreme Court so as to bar this appellant's action has the effect of depriving this appellant of its property without due process of law. As construed, the tax statute is unconstitutional.

In *Buty* v. *Goldfinch*, 74 Wash. 532, 133 Pac. 1057 (1913), the Supreme Court of Washington had occasion to discuss a short three (3) year statute as applied to an action to set aside a void tax deed. In collecting and reviewing the authorities the court, quoting from *Dingey* v. *Paxton*, 60 Miss. 1038, said:

> "* * * * * * One who is in the actual or constructive possession of his lands, and who has the right of possession and of property, needs no action to enforce his rights. He is already in the enjoyment of all that the law can give him, and cannot be disturbed in such enjoyment except by "due course of law." " (p. 1059)

The principle there announced was correct. We too assert that the title to this appellant's property "cannot be disturbed in such enjoyment except by 'due course of law.'" There is no showing in this entire record that C. L. Dew ever entered into possession of this appellant's ½ mineral interest under his void deed. That being so, title cannot be divested without doing violence to the due process clause. As was so aptly stated by Judge Parker in *Buty* v. *Goldfinch*, *supra*,

> "* * * We have held that a void tax deed may constitute such color of title as to become a basis for the running of the statute of limitations (Lara v. Sandell,

52 Wash. 53, 100 Pac. 166); but not that such color of title, unaccompanied by possession, will by mere lapse of time divest the original owner of title to property he is in the actual possession and enjoyment of. * * *" (p. 1058)

In *Baker* v. *Kelley*, 11 Minn. 480 (1865), the court had this to say about a short tax "limitation" statute which barred all rights to test the validity of a tax deed one year after the deed was recorded:

"* * * The year within which the action may be brought, commences to run, not from the time the cause of action accrues, but from an act done, the record of the tax deed; and the cause of action (if this statute refers to ejectment) may not accrue for an indefinite period after such act; it may accrue a month, a week, or a day before, or not until after the expiration of the year within which suit must be brought. *Such a law is clearly in contravention of the constitution*, as it must necessarily operate as a denial of a remedy in many, perhaps in a majority of cases. In the case under consideration, we have no evidence, nor have we any right to presume that the action was not commenced immediately after a cause of action in ejectment accrued. The plaintiff, so far as the record shows, may have been in the actual possession of the real estate in question, until within a week or even a day of the commencement of this suit. * * * Every intendment must be in favor of the validity of a statute, but when it is clear that it denies 'a certain remedy in the laws' to any person or class of persons, *it cannot be sustained*. However good the intention of the legislature may have been in framing this law, it cannot be doubted but that the law in effect, if interpreted according to the defendant's view, takes away the remedy for the contest of these tax titles. * * *" (pp. 371-372)

So here, there is no showing that defendant ever obtained possession and, however good the intention of the legislature, the statute cannot be sustained as a bar to this action.

Without burdening the court with further discussion of cases, we cite the following authorities which are in support of the views hereinbefore discussed. *Taylor* v. *Miles*, 5 Kan. 302 (1870); *Alexander* v. *Gordon*, 101 Fed. 91 (1900); *Dingey* v. *Paxton*, 60 Miss. 1038 (1883); *Martin* v. *White*, 53 Ore. 319, 100 Pac. 290 (1909).

By way of summary we point up the following facts:

On June 9, 1942 this appellant owned a ½ interest in the minerals. These minerals were purportedly sold in a tax sale, confirmed on August 5, 1942. C. L. Dew, County Commissioner, was the purchaser at the tax sale. Under the law of Kansas C. L. Dew was by public policy a disqualified purchaser and grantee. The tax deed to a disqualified and incompetent grantee was contrary to public policy, illegal and void. Dew did not go into possession of these minerals. He did not oust this appellant. The deed to him was wholly ineffective for want of a qualified and competent grantee and passed no title. The legal and equitable title remained in this appellant. Yet the six-month limitation statute, as construed by the Kansas Supreme Court, has *divested the title out of this appellant and vested it in Dew.* We respectfully urge that such a holding is contrary to the authorities; it deprives this appellant of its property without due process of law and is repugnant to the Fourteenth Amendment to the Constitution of the United States.

The issue thus raised is vital to this appellant and is dispositive of this case. Furthermore, legislatures in almost all states have enacted statutes similar in nature to the statute here involved. In construing and enforcing such statutes state courts are necessarily guided by the limita-

tions of the due process clause as established by the United States Supreme Court. We submit that by any yardstick there is here involved a substantial question.

Respectfully submitted,

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APPENDIX "A"

SHELL OIL CO., INC. V. BOARD OF COUNTY COM'RS OF GRANT COUNTY ET AL., 171 Kan. 159; 231 P. (2d) 220

Syllabus by the Court

1. On the ground of sound public policy a county commissioner, in his private and individual capacity, is not an eligible purchaser at a sheriff's sale in a tax foreclosure action brought by a board of county commissioners of which he, during all stages of the proceeding, was a member.

2. In an action to vacate and set aside a judgment and all subsequent proceedings had in a tax foreclosure action, the record is examined and it is *held:* All proceedings in the tax foreclosure action were governed by the provisions of the tax foreclosure act (G.S. 1941 Supp. 79-2801 to 2809), of which section 2804b is a part, and the action to vacate and set aside, being commenced more than six months after the date of confirmation of sale in the tax foreclosure action, was brought too late.

PRICE, *Justice:*

This was an action to vacate and set aside a judgment and all subsequent proceedings had in a tax foreclosure action. From a judgment setting aside the sheriff's sale and deed issued pursuant thereto, and quieting plaintiff's title to the property in question upon its compliance with the judgment, the defendant purchaser has appealed.

This is the second appearance in this court of litigation over the validity of the tax foreclosure judgment and sale in controversy. The first appeal was from an order overruling a demurrer to plaintiff's (appellee's) verified amended petition. Our decision affirming that ruling is found in Shell Oil Co. v. Board of County Comm'rs, 165 Kan. 642, 197 P. 2d 925. In that appeal two cases were consolidated. The instant appeal is in what was case No. 37,263, in the former appeal, and involves only the sale to C. L. Dew, a member of the Board of County Commissioners. In the interest of brevity the factual background of

the matter as alleged in the verified amended petition will not here be set out, but the summary of those allegations, beginning at the bottom of page 643 and ending with the first paragraph commencing on page 645 of our former opinion in 165 Kan. 197 P. 2d 926, 927, is by reference incorporated herein.

The parties will be referred to as in the court below.

Defendant Dew's answer admits that at all times during the tax foreclosure action he was a duly elected and acting member of the Board of County Commissioners of Grant County; that he, together with other members of the Board, authorized and directed the county attorney to institute a tax foreclosure suit, and further authorized the employment of an outside attorney to assist in such procedure. He specifically denies he had prior knowledge that no tax lien existed against the property in question, and further alleges that in truth and in fact a valid tax lien at such time did exist. The answer further denies that he unlawfully, intentionally, wrongfully or fraudulently undertook to deprive plaintiff of the property, or that he practiced any fraud upon plaintiff or upon the court to procure a decree of foreclosure in the action, but, on the contrary, alleges that he acted in good faith in an effort to discharge his duties as a public officer, and that all of his acts, both individually and as a public officer, were carried out and discharged in good faith. The answer then admits that he bid in the property in question at the sheriff's sale, as alleged by the plaintiff, but alleges he was interested in the property by reason of the fact he was the owner in fee of the surface and one-half of the mineral rights; that he bid in such property at a regularly conducted sheriff's sale, under competitive bidding; that he was the highest bidder therefor, and that all proceedings in connection with such foreclosure action, from its commencement down to and including the sale to him, were regular and in conformity with law, and were carried out in good faith by defendant and all parties concerned. The answer further alleges that plaintiff's cause of action, if it has any, is barred by the statute of limitations.

The cause proceeded to trial by the court. Oral testimony, if any was introduced, is not abstracted. The court made conclusions of fact and of law. Included in the former is a

finding that taxes in the amount of $1.77, for the year 1932, had become delinquent when the property in question was standing in the name of one Long, plaintiff's grantor; that it had been bid in by Grant County and was entered on the delinquent tax sale records, and there carried until 1942, when it was foreclosed; that plaintiff was served by publication notice only, but, as a foreign corporation, could have been served through the secretary of state; that judgment was rendered June 9, 1942, finding the taxes on the undivided one-half mineral interest in question to be delinquent and unpaid in the amount of $3.27, and foreclosure of such tax lien was ordered. The court then made a finding that the property in question was sold by the sheriff of Grant County to defendant Dew for the amount of $10.00, and that such sale was confirmed and sheriff's deed issued to him.

The court further found: "That C. L. Dew, the purchaser of said mineral interest in Case No. 1655, was duly elected as a member of the Board of County Commissioners of Grant County, Kansas, and qualified for such office in 1941, and was a member of said Board at the time the proceedings were instituted in Case No. 1655, at the time judgment was rendered, and at the time of the sheriff's sale therein."

The conclusions of law were that plaintiff was a proper party plaintiff in this action; that the taxes for 1932 on the undivided one-half mineral interest in the property involved were properly assessed, were delinquent and were subject to foreclosure; that the service by publication notice in the tax foreclosure action was valid, and that the judgment foreclosing the tax lien on the property in question was valid.

The court then rendered the following conclusion of law:

"V.

"C. L. Dew, by reason of being a member of the Board of County Commissioners of Grant County, Kansas, during the pendency of Case No. 1655, and at the time of the sheriff's sale therein, was not an eligible purchaser, and the sale to him was void. The sale and sheriff's deed issued to C. L. Dew are hereby set aside."

Pursuant to its conclusions of fact and of law the court

rendered judgment barring and excluding defendants from all right, title and interest in the property in controversy, and further decreed: "* * * that the title of plaintiff to said real property be, and is hereby, quieted and confirmed except for the lien of the certain judgment heretofore rendered in case No. 1655 in this court, entitled Board of Commissioners of Grant County, Kansas v. George S. Howell, et al., in the sum of $3.27 with interest at the rate of 10% per annum from June 9, 1942, and costs in the sum of $4.00; and that the plaintiff, upon payment of said judgment in said action be, and is hereby adjudged to be the owner of the real property heretofore described in fee simple, free of all rights, claims, or liens."

Defendant Dew's motion for new trial, alleging erroneous rulings and conclusions of law by the court and that the judgment is contrary to law, being overruled, he has appealed, specifying as error the making of conclusion of law number V, above quoted, the rendition of judgment in favor of plaintiff, and in overruling his motion for new trial.

At the outset we are confronted with plaintiff's motion to dismiss the appeal, based on the following facts:

The journal entry of judgment recites that the Board of County Commissioners of Grant County, as such, appeared and participated in the trial. That body was adjudged to have a lien on the property involved. In other words, the earlier judgment, foreclosing the tax lien, was upheld—only the sale and deed to Dew being held void and set aside. He is the only defendant who appealed and his notice of appeal is directed only to plaintiff and its attorneys of record. Our appeal statute, G. S. 1949, 60-3306, provides that: "* * * A copy of such notice must be personally served on all adverse parties whose rights are sought to be affected by the appeal, and who appeared and took part in the trial, or their attorneys of record: * * *" and plaintiff contends the Board of County Commissioners is therefore a necessary party to the appeal, the argument being that if Dew should prevail the lien decreed in favor of the Board would necessarily be extinguished—thus its rights would be "affected" within the meaning of the statute, and we are cited to language contained in Grant v. Reed, 163 Kan. 105,

179 P. 2d 945, where it was said: "We have often held that where a judgment against several defendants is brought to this court for appellate review and it appears that a modification or reversal of the judgment will affect a defendant who has not been made a party the appeal will be dismissed." 163 Kan. at page 106, 179 P. 2d at page 946.

(1) That isolated sentence, however, must be read in connection with other statements contained in the opinion and from them it is clear that our holding there is to be construed as meaning that notice of appeal must be served on those parties to the litigation to whose interest it is that the judgment of the lower court be upheld and who are interested in opposing the relief sought by the appellant. See Protzman v. Palmer, 155 Kan. 240, 124 P. 2d 455; and In re Estate of Weaver, 170 Kan. 321, 224 P. 2d 1004, where it was held: "Where—as here—a judgment is brought to this court for appellate review and it appears that a modification or reversal of such judgment will adversely affect a litigant who has not been made a party the rule that the appeal must be dismissed is well established." (Citing cases.) 170 Kan. at page 325, 224 P. 2d at page 1006.

Narrowed down to what actually is sought in this appeal it is clear that defendant Dew seeks to reverse the judgment which decreed the sale and deed to him to be void. If he should prevail the county still has the money representing the amount of delinquent taxes, interest and costs paid by him at the sheriff's sale, but its lien would be extinguished. If the judgment is affirmed the county still has its judgment lien subject to its being extinguished by payment to the county by plaintiff of the amount of delinquent taxes, interest and costs, as provided in the judgment. Thus it would seem that in either event the result, as far as the county is concerned, would be the same. The facts here are not to be confused with those in Board of County Com'rs of Cowley County v. Herbert, 163 Kan. 590, 185 P. 2d 153, also relied on by plaintiff, where the attempted appeal was from an order sustaining a demurrer to a motion filed by the appellant to vacate and set aside a judgment, order of sale, confirmation thereof, and a sheriff's deed in a tax foreclosure proceeding, and where no notice

of appeal was served on the Board of County Commissioners. Obviously, in that case it was to the interest of the county that the foreclosure *judgment* be upheld.

(2) Without further discussion of the matter we hold it has not been made clearly to appear that a modification or reversal of the judgment appealed from will adversely affect the interests of the county, and the motion to dismiss the appeal is therefore denied.

This brings us to the first of two principal questions involved in this case—is a county commissioner, in his private and individual capacity, an eligible purchaser at a sheriff's sale in a tax foreclosure action brought by the Board of County Commissioners of which he, during all stages of the proceeding, was a member? We are aware that in view of our ultimate holding an answer to this question is not necessarily essential to what we consider to be a correct disposition of this appeal. However, in the interest of sound public policy and for the benefit of bench and bar generally, we think the question should be answered.

The position of defendant (appellant) is that he joined with the other members of the Board under the appropriate statute, G.S. 1941 Supp. 79-2801 to 2809, in directing the county attorney to bring the tax foreclosure action against the owners of all real estate which had been sold at delinquent tax sales and which remained unredeemed for a period of three years after such sales; that the statute was mandatory; that after the action was instituted all subsequent proceedings were judicial in nature and he and other members of the Board had no further connection with the matter; that the sale here was conducted by the sheriff under competitive bidding, as provided by law; that he was the highest bidder; the sale to him was confirmed and deed issued; and that the whole proceeding, from beginning to end, was free from fraud and any wrongdoing.

He also directs our attention to the fact the legislature, by specific enactment, has declared who shall be disqualified to purchase at a judicial sale, and cites G.S. 1949, 60-3419, a portion of which reads: "* * * No sheriff or other officer making the sale of property, either personal or real, nor any appraiser of such property, shall either directly or

indirectly purchase the same; and every purchase so made shall be considered fraudulent and void."

In support of the judgment of the lower court plaintiff contends the principle involved is one of public policy, and invokes the well-established and often repeated maxims —that no man can serve two masters; no agent can serve two principals; that a trustee or other person occupying a fiducial relationship cannot traffic in the trust estate; that every public official should scrupulously avoid placing himself in a position where his integrity and honesty can be drawn into question—and cites a number of our early decisions which prohibit a county treasurer from purchasing, directly or indirectly, any land sold by him at a tax sale, Spicer v. Rowland, 39 Kan. 740, 18 P. 908; Sponable v. Woodhouse, 48 Kan. 173, 29 P. 394, as being indicative of this court's attitude on the general subject matter.

In examining this question we recognize that in directing the county attorney to bring the tax foreclosure action the Board of County Commissioners of Grant County was merely performing a ministerial duty imposed upon it by statute, G.S. 1941 Supp. 79-2801. We are also aware that by Ch. 362, Laws of 1945, the statute was amended so that the bringing of a tax foreclosure action where the real estate involved is a mineral interest in land which has been severed from the fee, as here, is within the discretion of the Board. However, that subsequent amendment is not necessarily persuasive in our decision on the merits of this case, all proceedings in which were had prior to its enactment.

Little benefit would result from a discussion of such precedents as are cited by counsel for either side, and neither have we found any precisely similar. What is similar in all, though, is the animating principle of fair and honest dealing on the part of those who, by virtue of their positions, have it within their power to acquire interests where they have a duty to perform in a manner inconsistent with such private interests.

(3) We are convinced the conclusion of the lower court that defendant was not an eligible purchaser was eminently correct, if for no other reason than upon grounds of sound

public policy. In so holding we do not mean to infer the transactions under review were fraudulent in fact. The law and ethics of a situation such as this should not rest upon the principle of actual fraud, but are founded on the theory that fraud in such cases is best prevented by removing all temptation. In other words, the rule rests on prevention of fraud and is based upon the moral obligation of everyone, and particularly a public official, to refrain from placing himself in a position which ordinarily creates or excites a conflict between self-interest and integrity. We think it is better that the danger and cause of the evil should be prohibited in all cases than that courts should be relied upon to apply the remedy by inquiring into the facts of a particular case to ascertain whether there has been fraud in fact. Fullness of price, absence of fraud, and fairness of purchase, are not sufficient to overcome this rule of policy. Entirely aside from any element of actual fraud, the only adequate remedy is to declare one occupying the position of defendant an ineligible purchaser at such a sale. On this broad general principle the language of the late Justice Cardozo, when Chief Judge of the New York Court of Appeals, seems very appropriate: "* * * Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. * * * Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court." Meinhard v. Salmon, 249 N. Y. 458, 164 N.E. 545, 546, 62 A.L.R. 1.

So far as this particular phase of the case is concerned we agree with the trial court's conclusion—one in the posi-

tion of defendant was an ineligible purchaser at the sheriff's sale.

And this brings us to the all-important question relating to the finality of tax foreclosure proceedings, including the sale, confirmation thereof and sheriff's deed. Here the tax foreclosure judgment was rendered in June, sale was made in July, and the sale was confirmed and deed issued in August, all in the year 1942. This action to vacate and set aside was not commenced until January, 1946, about three and one-half years later. Defendant contends that even though it should be held he was not an eligible purchaser, nevertheless, plaintiff's action, not being commenced within six months after the confirmation of the sale, was brought too late, and he relies upon the provisions of G.S. 1941 Supp. 79-2804b (that being the statute in force at the time of the tax foreclosure proceedings in question), which read: "Legal or equitable actions or proceedings may be brought to open, vacate, modify or set aside any judgment rendered for taxes, interest and costs or any order of sale made under the provisions of section 19 (79-2803) hereof, or any sale made under the provisions of section 20 (79-2804) hereof but every such action or proceeding, including those brought on the grounds and in the manner prescribed by the code of civil procedure, must be commenced within six months after the date of the sale of the real estate, which was affected by such judgment, order of sale or sale, was confirmed by the court. The provisions of this section shall apply to all judgments, orders of sale, and sales whether the purchaser at the foreclosure sale be the county or an individual."

Plaintiff's position is that defendant's title is dependent upon two things—first, a valid sale, and second, a valid deed; that here, there being no competent bidder, there was no sale, hence no deed; that the statute offers no protection to one claiming under a void sale or a void deed, and that they may be attacked at any time.

The precise question was not in issue when this case was previously before us. 165 Kan. 642, 197 P. 2d 925, supra. The question there was the correctness of an order

overruling a demurrer to the verified amended petition which alleged there were in fact no delinquent taxes against the property which has been foreclosed. We affirmed the lower court, the basis of our decision being that under such circumstances, that is, where no taxes were delinquent, the court would acquire no jurisdiction over the property in the tax foreclosure action, the county would have nothing to sell, and therefore nothing would be conveyed to the purchaser. Putting it another way, the holding in that decision was that the tax foreclosure act, G.S. 1941 Supp. 79-2801 to 2809, simply had no application to property upon which all taxes levied were fully paid.

Here, however, we have a different situation. The court found that taxes for the year 1932 were delinquent and that the property in question had been bid in by the county and carried on the delinquent tax sale records. The court therefore had jurisdiction to render its judgment in the tax foreclosure action in 1942. In other words, the provisions of the tax foreclosure act applied to those proceedings.

Despite our holding that defendant was not an eligible purchaser at the sheriff's sale, and irrespective of whether the sale, confirmation thereof, and the deed be considered void or merely voidable—we are of the opinion plaintiff's action was brought too late. Considering the confirmation of the sale to be an absolutely void "judgment," it may be argued that under the provisions of G.S. 1949, 60-3009, it could be vacated at any time on motion of a party or any person affected thereby. On the other hand, reference is made to G.S. 1949, 60-303, which provides: "Civil actions can only be commenced within the periods prescribed in this article, after the cause of action shall have accrued; but where, in special cases, a different limitation is prescribed by statute, the action shall be governed by such limitation."

Under G.S. 1941 Supp. 79-2804b, every action, either legal or equitable, to open, vacate, modify or set aside any judgment rendered for taxes, or any order of sale made thereunder, including those actions brought on the grounds and in the manner prescribed by the code of civil procedure,

must be commenced within six months after the date of confirmation of sale, and the provisions of this section apply to all judgments, orders of sale and sales, whether the purchaser be the county or an individual. We think the clear intention of the statute is to supersede any and all other provisions of the code insofar as they may relate to actions to vacate, modify or set aside judgments, orders of sale and sales in tax foreclosure proceedings.

The statute fixes a definite time within which such an action may be brought. The legislature had authority to make such a limitation and there was a good purpose in its doing so, namely, that purchasers at tax foreclosure sales would know a limitation of time within which the proceedings might be attacked. To hold otherwise would merely introduce confusion and unsettle every title growing out of a tax foreclosure action. Every title examiner would pause when confronted with a title derived from tax foreclosure proceedings, notwithstanding the statute, G. S. 1941 Supp. 79-2804 states the deed shall convey a fee simple title. Purchasers at tax foreclosure sales could never be certain whether they were purchasing fee simple titles or prospective lawsuits. We think the legislature clearly intended to remove, after the passage of the time prescribed by the statute, the uncertainty which has been conceded by everyone to exist with reference to tax titles.

In passing, we note that the statute under consideration as it now appears, G. S. 1949, 79-2804b, has been amended in that it now provides that such actions to vacate, modify or set aside, must be commenced within twelve months after the date of confirmation of sale, and that other language in the section, as amended, is even a stronger indication of the legislative intent to place a stamp of finality on tax foreclosure proceedings after the expiration of the time prescribed.

See also *Blair* v. *Pooler*, 160 Kan. 201, 204, 160 P. 2d 672; *Board of County Com'rs of Sheridan County* v. *Acre*, 160 Kan. 278, 287, 160 P. 2d 256; and *Board of County Com'rs of Allen County* v. *Groomer*, 166 Kan. 593, 598, 203 P. 2d 237.

(4) In conclusion, and by way of summary—we hold

that on account of the facts as hereinbefore related, defendant Dew was an ineligible purchaser at the sheriff's sale. However, taxes lawfully levied for the year 1932 being delinquent, the provisions of the tax foreclosure act, G. S., 1941 Supp. 79-2801 to 2809, applied to the entire foreclosure proceeding. Included in the act is 2804b, the provisions of which have been discussed in detail. The instant action to vacate and set aside, not being commenced within six months from the date of confirmation of the sale, was brought too late.

It therefore follows that the judgment of the lower court is reversed with directions to enter judgment in favor of defendant Dew.

SMITH, J., dissents from that part of paragraph 2 of the syllabus and the corresponding portion of the opinion which hold that the action was brought too late.

APPENDIX "B"

SHELL OIL CO., INC. v. BOARD OF COUNTY COM'RS OF GRANT COUNTY ET AL., 171 Kan. 595; 237 P. (2d) 257.

Syllabus by the Court

In proceedings governed by the tax foreclosure act (G. S. 1941 Supp. 79-2801 to 2809) every action, either legal or equitable, to open, vacate, modify or set aside any judgment rendered for taxes, or any order of sale or sale made thereunder, must be commenced within six months after the date of confirmation of sale. (G. S. 1941 Supp. 79-2804b.)

PRICE, Justice.

The original opinion in this case is reported at 171 Kan. 159, 231 P. 2d 220. The facts will not be repeated here. A rehearing was granted to appellee, and it is argued that the application of G. S. 1941 Supp. 79-2804b to prevent the recovery of title to land as against one claiming under a void deed constitutes a taking of property without due process of law in violation of the Fourteenth Amendment

to the Constitution of the United States, and that the legislature cannot change ownership into a mere right of action and then declare a forfeiture of the title if the owner fails to bring an action within the six months' period provided for in the statute.

(1) We have examined these arguments and the authorites cited in support thereof, but in our opinion they are either inapplicable to the question before us or without substantial merit.

(2, 3) Further consideration of this question convinces us of the soundness of the rule laid down in our original opinion, namely, that in proceedings governed by the tax foreclosure act, G. S. 1941 Supp. 79-2801 to 2809, every action, either legal or equitable, to open, vacate, modify or set aside any judgment rendered for taxes, or any order of sale or sale made thereunder, including those actions brought on the grounds and in the manner prescribed by the code of civil procedure, must be commenced within six months after the date of confirmation of sale, G. S. 1941 Supp. 79-2804b. We think it was within the power of the legislature to enact such a statute fixing a definite time within which such an action may be brought. While factually dissimilar, see *O'Keefe* v. *Behrens*, 73 Kan. 469, 85 P. 555, 8 L. R. A., N. S. 354; *James* v. *Logan*, 82 Kan. 285, 108 P. 81, 136 Am. St. Rep. 105; *Erskine* v. *Dykes*, 158 Kan. 788, 150 P. 2d 322; *Schlemeyer* v. *Mellencamp*, 159 Kan. 544, 156 P. 2d 879; and *Bradley* v. *Hall*, 165 Kan. 358, 194 P. 2d 943, as bearing on the general subject matter.

We adhere to our original opinion.

Smith, J., dissenting.

APPENDIX "C"

SHELL OIL CO., INC. v. BOARD OF COUNTY COM'RS OF GRANT COUNTY ET AL., 165 Kan. 642, 197 P. 2d 925

Syllabus by the Court

1. The entire matter of taxation, including the levy and collection of taxes, is statutory and does not exist apart from statute.

2. Chapter 375, Laws 1941, is an act relating to the collection of delinquent taxes, refers only to real estate on which taxes are due and unpaid and applies to no other real estate.

3. Compliance with tax statutes is essential to acquisition of jurisdiction.

4. In a tax foreclosure action instituted by a board of county commissioners pursuant to the provisions of chapter 375, Laws 1941, the district court had power to determine the amount of taxes actually delinquent on real estate but was granted no jurisdiction or power to sell real estate and to divest the owner of his title when the taxes thereon were fully paid.

5. That a tax is due and unpaid is either specifically or necessarily by implication embodied in every provision of an act for the sale of real property for taxes.

6. That a tax must actually be due and unpaid before real estate can be sold for taxes is a prerequisite essential to fair dealing between a sovereign and its citizens.

7. Where the sovereign has no charge or claim against property for taxes the sovereign has nothing to sell and although a court goes through the form of a sale it sells nothing and conveys nothing to the purchaser.

8. The amended petitions in actions to vacate and set aside a judgment and sales of mineral interests in a tax foreclosure action examined, and held, the trial court properly overruled defendants' general demurrer to such petitions.

Harvey, C. J., dissenting.

Appeal from District Court, Grant County; F. O. Rindom, Judge.

Action by Shell Oil Company, Inc., against Board of County Commissioners of Grant County, H. W. Stubbs, and W. P. Wesley, and against Board of County Commissioners of Grant County, and H. W. Stubbs and W. P. Wesley and C. L. Dew, to vacate and set aside, as void, two sheriff's deeds issued in a tax foreclosure action brought by the defendant board. From order overruling demurrer to petitions, defendants appeal.

Order affirmed.

WEDELL, Justice.

Two actions were instituted in the district court of Grant County to vacate and set aside as void two sheriff's deeds issued in a tax foreclosure action brought by the board of county commissioners of Grant county. One purchaser of a mineral interest was a member of the same board of county commissioners that instituted the foreclosure action. The purchaser of the other mineral interest was an attorney employed by the board to assist the county attorney in the tax foreclosure action. Service in that action was by publication.

The defendants in the instant action are the board of county commissioners, W. P. Wesley (county attorney of Grant county), and the two purchasers at the sheriff's sale. The plaintiff is Shell Oil Company, a corporation, formerly Shell Petroleum Corporation, a foreign corporation, authorized to do business in Kansas, with its principal place of business in this state and its post office address in the Central Building, Wichita, Kansas.

The defendants jointly filed a general demurrer to plaintiff's verified amended petition. Defendants appeal from the order overruling their demurrer. The only material factual difference in the two present actions is the mineral interest involved and the purchasers thereof. The appeals in cases No. 37,262 and No. 37,263 have been consolidated.

The journal entry of judgment, the order of sale and the confirmation of the sheriff's sale in the tax foreclosure ac-

tion were attached to and made a part of each petition in the instant cases. The petitions are quite lengthy. In our view of the case it is unnecessary to set forth the petitions in full.

We shall continue to refer to the parties as plaintiff and defendants except where necessary to distinguish between the Shell Oil Company and the Shell Petroleum Corporation. In that event we shall refer to the corporation as the oil company or as the petroleum corporation.

Some of the salient facts alleged in the verified amended petition in case No. 37,262, in substance, were: The petroleum corporation was a defendant in the tax foreclosure action; the journal entry of judgment in that action disclosed the owner and party claiming the mineral interest involved was the petroleum corporation; the oil company, formerly the petroleum corporation, a foreign corporation, was authorized to do business in this state; at all times during its existence in this state petitioner had a service agent appointed in this state, as required by law, upon whom personal service could be had and service could likewise have been had on the secretary of state; the tax foreclosure action was filed on March 19, 1942; the oil company, formerly the petroleum corporation, on that date and for many years prior thereto had been the owner of the undivided mineral interest involved; there were no delinquent taxes on that mineral interest on March 19, 1942; the petitioner had at all times paid the taxes in full; the records of the county treasurer of Grant county disclosed there were no delinquent taxes on "said land" on March 19, 1942; notwithstanding defendants' knowledge that no tax lien existed against "said land" the defendants, W. P. Wesley, county attorney, and H. W. Stubbs, as agents and attorneys for the defendant board of county commissioners, instituted the action seeking to foreclose alleged tax liens; the mineral interest and many other properties, were sold on July 26 and 28 and the sales were confirmed August 5, 1942; the alleged unpaid tax on the mineral interest was $3.57; the costs were $4; the market value of the mineral interest on March 19, 1942 was $6,000; the mineral interest was purchased at sheriff's sale for the grossly inadequate

and unconscionable sum of $20 by H. W. Stubbs; the county attorney and H. W. Stubbs, as agents and attorneys for the board of county commissioners, instituted the tax foreclosure action for Grant county; in that action the county attorney and H. W. Stubbs acted as governmental agents and representatives of the taxpayers and the general public; although petitioner had a resident agent in this state, as required by law, upon whom personal service might have been had and although personal service likewise might have been had on the secretary of state service was nevertheless obtained by publication only; the publication service was approved by the district court by reason of an affidavit filed by the county attorney in which it was knowingly and falsely stated that personal service could not be had on the petitioner in the instant case in this state; that defendants conspired to fraudulently deprive petitioner of its title to the mineral interest involved; the petitioner had no actual notice of the foreclosure action and the fraud of defendants until April 1, 1944; until that date this petitioner had relied on its record title, returned the same for taxes each and every year and had paid all taxes assessed against it; had this petitioner had notice of the foreclosure action it could, and would, have shown the court it was the lawful owner of said land free and clear of any alleged tax liens.

It is conceded the allegations in case No. 37,263 were substantially the same except the petition in that case, in substance, further stated: The alleged unpaid tax on that mineral interest was $3.27; the mineral interest was purchased at sheriff's sale by C. L. Dew, a member of the board of county commissioners for the inadequate and unconscionable sum of $10; the market value of "said land" on March 19, 1942, was $6,000.

It is conceded the mineral interest in each of these cases is an interest in real estate and that where the petitions refer to it as "said lands" the property so designated is the mineral interest involved.

The tax foreclosure action was governed by chapter 375, Laws 1941, and all references will be made to it or to sections thereof contained in G. S. 1941 Supp. to the General Statutes of 1935.

Plaintiff, in substance, framed the petitions to vacate and set aside the tax foreclosure judgment and sales on the following theories, to wit: (1) the tax foreclosure act, chapter 375, Laws 1941, under which the mineral interests were sold, does not relate to the sale of real estate on which the taxes are fully paid but only to the sale of real estate on which the taxes are "due and unpaid"; the judgment and sheriff's deeds issued in the foreclosure action are void for the reason the court acquired no jurisdiction of the subject matter; (2) the purchasers at the sheriff's sale, one a member of the board of county commissioners and the other an attorney appointed by that board to assist the county attorney in the foreclosure action, were representatives of the public and in such fiduciary capacity were disqualified purchasers and obtained no title as against this plaintiff; (3) jurisdiction over this plaintiff, if any, was acquired by means of fraud on the district court and this plaintiff and by reason of such fraud the judgment was void; and (4) service by publication was unauthorized as a matter of law and the judgment was void.

We have not attempted to set forth all allegations of the petitions designed to state a cause of action on each theory. Is the first theory sound? In Magnolia Petroleum Co. v. Moyle, 162 Kan. 133, 175 P. 2d 133, 134, we held:

"A tax foreclosure action brought under G.S. 1941 Supp., 79-2801, is a proceeding in rem, and jurisdiction of the res is essential to the validity of any judgment in such an action.

"Conditions precedent to the maintenance of a tax foreclosure action are that taxes lawfully assessed against real estate shall have been unpaid and the real estate involved must have been sold and bid in by the county at a delinquent tax sale, and unless those conditions exist, the district court has no jurisdiction of the real estate and any judgment ordering its sale is void.

"Where an interest in any minerals in any real estate is conveyed as provided in G.S. 1935, 79-420, and the deed is duly recorded or the interest listed for taxation as therein required, and thereafter the mineral interest is separately taxed and the taxes are fully paid, the mineral interest is

not subject to sale in any tax foreclosure action; * * *." (Syl. paras. 3, 4, 5.)

(1) Defendants argue these actions, not having been commenced within six months from the date the sales were confirmed, are barred by G.S. 1941 Supp. 79-2804b irrespective of whether the six month provision allowed for bringing these actions is properly regarded as a statute of limitations or as a condition precedent to the right to maintain them. In the final analysis the force of this contention depends on whether the tax foreclosure act, chapter 375, Laws 1941, of which the six month statute is a part, relates to the subject of the sale of real estate on which the taxes are fully paid. A careful reconsideration of our former decision in the Magnolia case, supra, and of all parts of the 1941 tax foreclosure law convinces us the legislature did not have the remotest intention of legislating on the subject of granting to county officials or to district courts jurisdiction to divest a citizen of his title to real estate on which the taxes were fully paid. That manifestly would be the logical and proper conclusion to reach even though some ambiguity concerning the question might exist in the act. No such ambiguity can be found in it. On the contrary section 1 of the act, G.S. 1941 Supp. 79-2301, clearly discloses the act applies only to real estate on which the taxes are delinquent. It reads:

"All real estate on which the taxes shall not have been paid * * * shall be subject to sale as hereinafter provided."

G.S. 1941 Supp. 79-2801, which pertains to tax foreclosure actions, reads:

"That in all cases in which real estate has been or shall be sold and bid in by the county at any delinquent tax sale * * *."

G.S. 1941 Supp. 79-2315 expressly requires "the taxes for which it (the real estate) is sold must be due and unpaid at the time of such sale." The entire act relates only to the collection of delinquent taxes and refers only to real estate on which taxes are due and unpaid.

It is not our purpose to again review at length the various cases cited in the Magnolia case, supra, or others which might be considered. We believe, however, brief additional comment concerning a few of them may be helpful. In Doty v. Bassett, 44 Kan. 754, 26 P. 51, a tax foreclosure statute, similar to the instant one on the precise point now under consideration, was involved. The court interpreted the statute to determine to what subject it related and to what real estate it referred in order to decide whether the court had jurisdiction of the subject matter in the tax foreclosure action. The statute was chapter 39, Laws 1877, the opening sentence of which read:

"That in all cases in which real estate has been or shall be sold and bid in by any city or county *at any delinquent tax sale*, and shall remain or shall have remained unredeemed and the certificate of sale untransferred for the period of three years after such sale, it shall be the duty of the attorney of such city or county to file a petition. * * *" (Our italics.)

To what subject did the court say that act related? It held it was an act "relating to the collection of delinquent taxes." To *what real estate* did it say the act referred? It held it referred to real estate on which "taxes are due and unpaid". Having so interpreted the statute the court applied it, the law, to the property in question and held:

"Chapter 39, Sess. Laws of 1877, relating to the collection of delinquent taxes on real estate bid off by counties and cities at tax-sales, is to be understood as referring to real estate where 'taxes are due and unpaid,' and not as including real estate belonging to the United States, and therefore not liable to taxation."

In conformity therewith the court concluded its opinion by saying:

"Here there was no delinquent tax. The district court *therefore* had no jurisdiction." 44 Kan. at page 757, 26 P. at page 52. (Our italics.)

To argue that decision is based on the ground property of the United States was involved is to reason backward. Such argument ignores the interpretation of the statute, the foundation of the decision. The court's lack of jurisdiction, as stated, was due to the fact there was no delinquent tax. The essence of the decision, therefore, is not the *reason* why no delinquent tax existed but the *fact* that none existed.

It is quite natural that there has been little occasion to cite the decision in the Doty case. Fortunately, it is seldom that a sovereign endeavors to divest a citizen of his title to property on which he has fully paid the taxes. Errors may occur in the preparation of lengthy tax foreclosure actions. That is quite understandable. When, however, the sovereign's own error is discovered none should be so prompt to rectify it as the sovereign. Ordinarily that is done with the result that such errors seldom reach the courts.

(2-4) It is well established that the fundamental prerequisite to a valid sale of real property for taxes is that there is a tax due and unpaid at the time of sale. That such tax is due and unpaid "is either specifically or necessarily by implication embodied *in every provision for the sale of real property for* taxes." (Our italics.) That a tax must be due and unpaid has been declared to be a "prerequisite essential to fair dealing between a sovereign and its citizens." Board of Com'rs of Montgomery County v. Wilmot, 114 Kan. 819, 824, 221 P. 276, 278. And that is doubly true where the records of the county treasurer show the taxes are fully paid. It has been well said that where a "sovereign had no charge or claim against the property for taxes" the sovereign had "* * * *nothing* to sell * * *" and that although it went through the form of a sale it "* * * sold *nothing*, and hence conveyed *nothing*." Board of Com'rs of Montgomery County v. Wilmot, supra, 114 Kan. at page 824, 221 P. at page 278. Manifestly where a purchaser at sheriff's sale received nothing the true owner is not by such sale divested of his title.

(5) It is said the district court in the instant tax foreclosure action was required to determine the *amount* of taxes, charges, penalties and interest chargeable to each tract of land or piece of real estate, G.S. 1941 Supp. 79-2802, and that it did so. To be sure the court was granted the

power and it had the duty to determine the *amount* of taxes due on lands when the taxes thereon were delinquent. But to say the court therefore was granted jurisdiction over the sale of lands not subject to sale at all and entirely outside the purview of the act is to confuse exercise of power with lack of jurisdiction.

Defendants emphasize the fact that the journal entry in the tax foreclosure case disclosed the property was sold as property owned and claimed by the petroleum corporation. It is true that where land is sold for taxes the law provides it need not be sold as the property of any person or persons and that no sale of the real estate shall be considered invalid on account of its having been charged on the tax roll in any other name that that of the rightful owner. G.S. 1941 Supp. 79-2315. The difficulty with defendants' contention, however, is that irrespective of who the owner might be the same statute nevertheless expressly provides that "the taxes for which it is sold *must* be due and unpaid at the time of such sale." (Our italics.) This mandatory provision is additional evidence of the legislative intent to make chapter 375, Laws 1941, relate only to the sale of real estate on which the taxes were "due and unpaid" and to no other real estate.

(6) Defendants further contend the petitions do not disclose plaintiff was a proper party to maintain the instant actions. The demurrer, of course, admits the allegations of the petition heretofore stated relative to the oil company's ownership of the property, that the taxes were all paid, that the records of the county treasurer's office so disclosed and that the taxes were also paid each year after the date of sale and until the discovery of the alleged fraud in April, 1944.

(7) It is true that in cases to which chapter 375, Laws 1941, applies the sheriff's deed when filed for record vests in the purchaser or grantee therein named, as against all persons, parties to such proceedings, a fee simple title and the deed is prima facie evidence of the regularity of all proceedings prior to the date of filing it for record. G.S. 1941 Supp. 79-2804. There being no taxes due and unpaid the act did not apply. No title passed to the purchaser. The oil company was not made a party to the tax foreclosure

proceedings. For the purpose of the demurrer defendants admit the oil company, formerly the petroleum corporation, was and is the owner of the property and that all taxes were fully paid. The petitions disclose a sufficient interest in the plaintiff to enable it to maintain these actions. Spicer v. Rowland, 39 Kan. 740, 18 P. 908. The actions may be maintained on legal or equitable grounds. G.S. 1941 Supp. 79-2804b.

(8, 9) It is elementary that the entire matter of taxation, including the levy and collection of taxes, is statutory and does not exist apart from statute. Magnolia Petroleum Co. v. Moyle, supra, 162 Kan. at page 139, 75 P. 2d 133, and cases cited. Compliance with tax statutes is essential to acquisition of jurisdiction. Crawford County Com'rs v. Radley et al., 134 Kan. 704, 8 P. 2d 386; Madigan v. Smith, 137 Kan. 269, 20 P. 2d 825; Bryner v. Fernetti, 141 Kan. 446, 41 P. 2d 712; Cunningham v. Blythe, 155 Kan. 689, 691, 127 P. 2d 489. In the tax foreclosure action presently challenged the county did not comply with the act but on the contrary it went outside the purview of the act and attempted to sell real estate which was not subject to sale and to which the tax foreclosure act did not apply.

The various cases cited by defendants on the points treated have been examined. In view of the basis upon which this decision is founded those cases do not, in our opinion, justify a reversal of the trial court's ruling.

The plaintiff insists the tax foreclosure judgment was also void by reason of each of its three other theories previously noted. The point we have treated is sufficient to affirm the order overruling defendants' demurrer. The opinion is not to be construed as passing on any other contention made by the parties.

The order overruling defendants' demurrer to plaintiff's petitions is affirmed.

WEDELL, *Justice* (concurring):

I desire to further state these sales should be declared void on the ground of public policy. A sale of property for taxes by public officers involves more than private interests. It is a matter of public concern. A public officer should not

be permitted to be both the seller and the buyer. These characteristics are wholly incompatible.

Entirely aside from any element of actual fraud the only adequate remedy for the mischief involved is to declare public officers unqualified purchasers. There being no sale to a qualified purchaser the sale is void. These principles have long been recognized and applied under varying circumstances. Haxton v. Harris, Treasurer, 19 Kan. 511; Spicer v. Rowland, 39 Kan. 740, 18 P. 908; Sponable v. Woodhouse, 48 Kan. 173, 29 P. 394.

Decisions of other courts are generally to the same effect. A few of them are Clute et al. v. Barron, 2 Mich. 192; Price's Adm'r v. Thompson, 84 Ky. 219, 1 S.W. 408; Chandler v. Moulton et al., 33 Vt. 245; Shrewsbury v. Horse Creek Coal Land Co., 78 W. Va. 182, 88 S.E. 1052; Coughlin v. Holmes, 53 Wash. 692, 102 P. 772; Michoud et al. v. Girod et al., 4 How. 503, 45 U. S. 503, 11 L. Ed. 1076, 1077.

Hoch, J., joins in the foregoing concurring opinion.

Parker, *Justice* (concurring):

Because I feel impelled to follow the doctrine of stare decisis, and therefore this court's decision in Magnolia Petroleum Co. v. Moyle, 162 Kan. 133, 175 P. 2d 133, I concur in the foregoing opinion.

Thiele, J., joins in the foregoing concurring opinion.

Harvey, *Chief Justice* (dissenting):

From the petitions it is clear that the title to "the land" in question stood of record in the name of the Shell Petroleum Corporation, a corporation. There is no allegation in the petitions that the Shell Petroleum Corporation, a corporation, was authorized to do business in Kansas, or that it had agents upon whom service of summons could be made in the foreclosure action. There is no allegation that as to the Shell Petroleum Corporation the affidavit for publication was defective or inaccurate.

The allegations in the petitions that the Shell Oil Company, Inc. was doing an extensive business in Kansas; that it was the duty of the plaintiff and its attorneys in the fore-

closure action to ascertain what interests the Shell Oil Company, Inc. had in the property, and notify it of the action, are untenable. The law imposes no such duty upon them.

If the Shell Oil Company, Inc., had succeeded to the business of the Shell Petroleum Corporation, a corporation, it had a duty to the plaintiff and its attorneys in the mortgage foreclosure action, and to all other persons who might be interested in the property, to have a deed of conveyance or other appropriate instrument filed of record in the office of the register of deeds showing the transfer to it of the interests of the Shell Petroleum Corporation, a corporation. It neglected that duty.

I am in accord with the view that property should not be sold for taxes if the taxes have been paid. Our legislature, by the tax foreclosure statute, has provided a means of ascertaining whether there are taxes due on property. This is in addition to the statutes which pertain to the assessment and levy of taxes. It is the plan of the statute to have everyone in court shown by the record to have any interest or title in the land, and to have a determination as to whether taxes are due. Plaintiff's real contention is that the court erred in making that determination. The statute makes provision for the protection of the owner of the property in such a case in addition to an appeal. The statute, G.S. 1945 Supp. 79-2804b, fixes a definite time, six months, within which any proceeding may be brought to set aside the judgment. The legislature had authority to make such a limitation. There was a good purpose in its doing so, namely, that purchasers at tax foreclosure sales should know a limitation of time within which the judgment of the court upon which the sale was predicated might be attacked. This action was not brought until 3½ years later.

It is correctly stated in the opinion that all matters pertaining to the assessment and levy of taxes and the sale of property for the nonpayment of taxes are statutory. These statutes are as binding upon the owner of property subject to taxation as they are upon the taxing officers.

This is a suit in equity in which the petitions disclose that plaintiff was derelict in its duty to give any legally recognized notice to the county or the taxing officials, or others

who might be interested in the property, of any interest it had in the property. The petitions further disclose that plaintiff failed to take the benefit of a statute enacted by which it might have cured any defect in the judgment. It seems clear to me that each of the petitions fails to state a cause of action.

I dissent, also, from the concurring opinion of Mr. Justice Wedell, it being my view that the principles of law there stated are not applicable to the facts alleged. In any event, they could affect only the sheriff's sale and order of confirmation and not the judgment in the foreclosure action.

Endorsements: 38,249. Shell Oil Company, Incorporated, Appellee, vs. Board of County Commissioners of Grant County, Kansas, C. L. Dew et al., Appellant. Statement as to Jurisdiction. Filed Dec. 31, 1951. Walt Neibarger, Clerk Supreme Court.